UNITED OVERSEAS BANK (MALAYSIA) BHD

v.

LEONG PIT TEE

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL KADIR SULAIMAN J
[CIVIL ACTION NO: 22-33-98]
5 MARCH 2000

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Service of notice of appeal not less than 2 clear days before day fixed for hearing appeal - Meaning of "day fixed for hearing the appeal" - Whether same as "day specified in the notice" - Notice of appeal served more than 2 clear days before adjourned hearing date but after date specified in notice as day of hearing - Whether good service - Rules of the High Court 1980, O. 56 r. 1(2) & (3)*

A notice of appeal against the decision of the registrar was issued specifying 29 November 1999 as the date of hearing of appeal. However, this hearing date was adjourned from time to time until 29 January 2000, on which date the respondent raised a preliminary objection. The facts giving rise to the preliminary objection were as follows. It was not disputed that the notice of appeal was served on the respondent on 3 January 2000. Pursuant to O. 56 r. 1(3) of the Rules of the High Court 1980 ('the RHC'), the notice of appeal must be served not less than 2 clear days before the day fixed for hearing the appeal. The respondent contended that "the day fixed for hearing the appeal" appearing in O. 56 r. 1(3) of the RHC is the "day specified in the notice" as stated in O. 56 r. 1(2) of the RHC which, in the instant case, was 29 November 1999. Therefore, the respondent argued that the notice of appeal was served out of time contrary to O. 56 r. 1(3) of the RHC and, as a result, the appeal should be struck out.

Held:

[1] The appellant cannot be penalised as a matter of course simply on the ground of short service or non-service of the notice of appeal on the respondent. In the case of non-service of the notice until the date specified by the court in the notice upon the issuance of the notice of appeal under O. 56 r. 1(2) of the RHC, if the reason provided by the appellant is accepted for the non-service, the hearing of the appeal would have to be adjourned to another date. In such an instance, the appellant must, in not less than 2 clear days before that other date, serve the notice of appeal

on the respondent if the hearing of the appeal is to proceed on the adjourned date. In the circumstances, "the day fixed for hearing the appeal" appearing in O. 56 r. 1(3) of the RHC need not necessarily be the same date as the "day specified in the notice" appearing in O. 56 r. 1(2) of the RHC.

[2] The service of the notice of appeal on the respondent on 3 January 2000, which was more than the 2 clear days required by O. 56 r. 1(3) of the RHC, before the hearing date on 29 January 2000 was good service and conformed with the requirement of O. 56 r. 1(3) of the RHC.

[Preliminary objection dismissed.]

Case(s) referred to:
Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(not foll)***
Public Feedmill (M) Sdn Bhd (in liquidation) v. Yeu Hin [1994] 2 MLJ 34 ***(not foll)***
Sykt Pembenaan Raya Sdn Bhd v. Langkawi Marble Co Sdn Bhd. & Ors [1998] 5 MLJ 202 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 56 r. 1(2), (3)

For the appellant - Zamani Mohamad; M/s Zamani Mohamad & Co
For the respondent - Muthumugam; M/s Balendran Chong & Bodi

Reported by S Dharmendran

JUDGMENT

Abdul Kadir Sulaiman J:

This is a decision relating to the preliminary objection raised on behalf of the respondent at the hearing of the appeal of the appellant to the judge in chambers pursuant to O. 56 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC 1980"). The decision of the registrar appealed against is over the decision dismissing the O. 14 application of the appellant to recover the sum guaranteed by the respondent in connection with the granting of an overdraft facility by the appellant to one Leong Yong Hor. In respect of the appeal process, it is not in dispute that the notice of appeal was issued within time. In the issued notice, the court specified 29 November 1999 being the day the parties in the appeal were required to attend before the judge. However, this attendant date was adjourned from time to time until 29 January 2000 for the reason to be given later.

Before me on 29 January 2000, the counsel for the respondent raised a preliminary objection and urged the court to strike out the appeal of the appellant in limine for the reason that the notice of appeal was not served on the respondent on or before 27 November 1999 so as to comply with the requirement of O. 56 r. 1(3) of the RHC 1980 which requires that the notice of appeal must be served not less than two clear days before 'the day fixed for hearing the appeal'. The contention of the learned counsel for the respondent is that 'the day fixed for hearing the appeal' appearing under O. 56 r. 1(3) is the 'day specified in the notice' appearing under O. 56 r. 1(2) which was 29 November 1999. It is again not in dispute that in the present case, the notice of appeal which carried that date was only served on the respondent on 3 January 2000. For such failure, the respondent contends that the appeal of the appellant was not properly brought before the judge. He based his argument on the authority of *Public Feedmill (M) Sdn. Bhd. (in liquidation) v. Yeu Hin* [1994] 2 MLJ 34 which is followed by *Ooi Chew Seng v. Ultratech Sdn. Bhd. & Ors.* [1997] 2 MLJ 344.

In *Public Feedmill (M) Sdn. Bhd. (supra)* the date specified in the notice of appeal was 12 October 1992. However, on that date counsel for the plaintiff reported that the notice had not been served and the court adjourned the matter to 8 February 1993 on which date it was again, because of non-service, adjourned to 8 June 1993. It was only on 5 May 1993 that the notice was served on the respondent. VC George J who heard the objection upheld the objection and dismissed the appeal. At p. 39 the learned judge said:

> Order 56 r. 1(3), as has been seen, prescribes that service of the notice has to be effected two clear days before that specified day. And as has been seen, this requirement was not met. ... The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that has been issued on 13th April and *per se* does not have the effect of extending the date of service of the notice.

In *Ooi Chew Seng (supra)*, the date specified in the notice of appeal upon issue was 29 October 1996. The hearing date was subsequently adjourned to 19 November 1996 at the request of the appellant. The notice was served on the respondent on 16 November 1996. The respondent raised a preliminary objection that the respondent was not served with a copy of the notice two clear days before the date fixed for the hearing of the appeal which date was taken to be 29 October 1996 as specified by the court in the notice issued. The issue before the court was whether the notice of appeal was validly served on the respondent. Nik Hashim JC (as he then was) upheld the preliminary objection and accordingly struck out the appeal of the appellant. At p. 350, following the decision in *Public Feedmill (M) Sdn. Bhd. (supra)*, he said:

> Order 56 r. 1(3) of the RHC prescribes that service of the notice of appeal has to be effected two clear days before the returnable day for hearing the appeal. In this case, whilst the notice was issued as required by the first limb of O. 56 r. 1(3) within the prescribed five days after the judgment, the requirement of the second limb was not met. ... Accordingly, I rule that the appeal cannot be said to have been brought properly before the court, and as such, on the preliminary objection, the appeal to the judge in chambers is struck off with costs.

However, in *Sykt. Pembenaan Raya Sdn. Bhd. v. Langkawi Marble Co. Sdn. Bhd. & Ors.* [1998] 5 MLJ 202 the court was again faced with a similar objection coming from the respondent. In that case, the plaintiffs filed a notice of appeal and it was issued in time as provided by O. 56 r. 1(3) of the RHC 1980. On the day fixed for the hearing of the appeal neither side was present before the court. The defendant was absent because it did not know of the hearing date and the plaintiffs were absent because their solicitor had failed to record the hearing date in the diary. The notice of appeal was thus struck out by the court. Then about four months later, the plaintiffs applied for reinstatement of the appeal. The defendant raised a preliminary objection by arguing that because the plaintiffs had failed to serve the defendant two days before the hearing date as required by O. 56 r. 1(3), the plaintiffs had therefore not brought an appeal according to the meaning of 'brought' in O. 56 r. 1(2) of the RHC 1980 and hence there was nothing for the court to reinstate. In resolving the matter, Abdul Aziz J in distinguishing *Public Feedmill (M) Sdn. Bhd. (in liquidation) and Ooi Chew Seng (supra)* held the view that the purpose of the two day period in O. 56 r. 1(3) is to ensure that the respondent would have time to prepare its case. Therefore, it would be wrong to rule that the appeal was not brought and to strike off the appeal when the default pertained to the time of service. He is further of the view that when there is non-compliance with the service time, the question which should arise is whether the court should fix or refuse to fix another hearing date. Fairness to the respondent and the appellant's lack of diligence in serving the notice of appeal would be grounds for refusal.

With respect to my learned brothers in *Public Feedmill (M) Sdn. Bhd. (in liquidation) and Ooi Chew Seng (supra)*, I am inclined to share the views expressed by my learned brother in *Sykt. Pembenaan Raya Sdn. Bhd. (supra)* when called upon to decide on the operation of O. 56 r. 1(2) and (3) of the RHC 1980. I am of the view that once the notice of appeal was properly issued as required by the first limb of O. 56 r. (3), the duty next is on the appellant to have that notice served on the respondent for the purpose of bringing the two parties before the judge in chambers for the hearing of the appeal. A minimum time frame is given by the rule to effect service of the notice of

appeal on the respondent. The purpose for that to my mind is to allow the respondent sufficient time to prepare his argument against the appeal on the hearing date before the judge. If the appellant failed to give notice of the appeal to the respondent within the minimum time period for whatever reason, the respondent cannot be forced to argue the appeal. This is what is normally known as short service. The respondent is entitled for an adjournment of the date of the hearing of the appeal to enable him to have sufficient time to prepare his argument. As for the court, it is within its discretion to decide whether an adjournment sought ought to be allowed. If good reason is given by the appellant for the late service of the notice of appeal, an adjournment ought to be allowed. If no good reason is provided, the court may strike out the appeal for lack of diligence on the part of the appellant in prosecuting his appeal. This is a separate exercise altogether to be undertaken by the judge in the making of the decision of either to allow the adjournment or to strike out the appeal. The appellant cannot however, be penalised as a matter of course simply on the ground of short service or non-service of the notice of appeal on the respondent. In the case of non-service of the notice until the date specified by the court in the notice upon the issuance of the notice of appeal under O. 56 r. 1(2), if the reason provided by the appellant is accepted for the non-service, the hearing of the appeal would have to be adjourned to another date. In such instance, the appellant must in not less than two clear days before that date serve the notice of appeal on the respondent if the hearing of the appeal is to proceed on the adjourned date. In the circumstances, 'the day fixed for hearing the appeal' appearing in O. 56 r. 1(3) need not necessarily be the same date as the 'day specified in the notice' appearing in O. 56 r. 1(2) of the RHC 1980.

In the present case before me, upon the issuance of the notice filed on 3 October 1999 by the appellant, the court specified 29 November 1999 as the date for the attendance of the parties before the judge. But on the day specified, the hearing could not take place because the date coincided with a subsequently declared public holiday. So, by a notice dated 14 November 1999 the court informed the solicitors for the appellant that the hearing scheduled for 29 November 1999 was adjourned to 19 December 1999. No similar notice was issued to the respondent as there was no evidence before the court that by then the notice of appeal had been served on the respondent. On 19 December 1999, only the appellant's representative and its counsel appeared for the intended hearing of the appeal. There was still no indication from the counsel that the notice of appeal had or had not been served on the respondent. Realising that the non-attendance of the respondent was justifiable owing to the absence of the notice for the adjourned hearing being issued to him, the court accordingly adjourned further the said hearing date to 2 January 2000. An appropriate notice for the new date of hearing was sent to the respondent, the appellant having been informed of the new date of hearing.

However, on 2 January 2000 again only the appellant's representative and its counsel appeared. The respondent or his counsel was absent. Again there was no information from the counsel that the notice of hearing had or had not been served on the respondent by then. As the evidence of the service of the notice of the adjourned hearing on the respondent was not available before the court, the hearing date of the appeal was again adjourned, this time to 29 January 2000. On this adjourned hearing date both parties appeared being represented by their respective counsel.

It was only on this occasion that the learned counsel for the appellant informed the court that the notice of appeal was only served on the respondent on 3 January 2000 due to an oversight on their part to do so earlier. No doubt the conduct of the counsel for the appellant in not informing the court earlier as to the service or non-service of the notice of appeal upon the respondent as expected of an officer of the court is blameworthy, but the issue before me now is over the validity of the appeal process on the ground that the notice of appeal was not served on the respondent 'not less than two clear days' before 29 November 1999.

Based on the views expressed earlier on the law concerning the operation of O. 56 r. 1(2) and (3) of the RHC 1980, I dismiss the preliminary objection of the respondent because the service of the notice of appeal on the respondent on 3 January 2000 which was more than the two clear days required by O. 56 r. 1(3) before the hearing date on 29 January 2000 was a good service and in conformity with the requirement of O. 56 r. 1(3) of the RHC 1980. This appeal of the appellant was properly before the court. I would, therefore, proceed to hear the appeal on merit.